Supreme Court, U.S.
FILED
JUL 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH V. MAGNONE and ROSE MAGNONE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

MICHAEL MAGNONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The decision of the District Court, as affirmed by the Second Circuit Court of Appeals, raises the following fundamental issues in an unsettled area of the law:

1. Does an unreasonable delay in an audit of a taxpayer's return by the Internal Revenue Service for a period in excess of twelve years violate a taxpayer's constitutional right to due process and fair treatment?

2. Are the actions of the Internal Revenue Service, taken in regard to the provisions 26 U.S.C.

6404, (abatements of assessments of interest) immune from all judicial review?

3. Under Section 26 U.S.C. 6404(e) what constitutes a tax deficiency and when does it arise?

4. Does payment of interest in full for one disputed year satisfy the "full payment doctrine" giving the district court jurisdiction to hear petitioners' refund suit?

5. Whether an inadvertent misdesignation of the basis for a refund claim, which has subsequently and timely been corrected to give the Internal Revenue Service adequate notice of the type of relief being sought, deprive the district court of jurisdiction to hear petitioners' refund suit?

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

JOSEPH V. MAGNONE and ROSE MAGNONE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

MICHAEL MAGNONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

==========

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUT

==========

The petitioners, Michael Magnone and Joseph V. and Rose Magnone, respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second

Circuit, entered in the above-entitled proceedings on April 25, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 902 F.2d 192, and is reprinted in the appendix hereto, p. A-3, infra.

The amended opinion and order of the United States District Court for the Southern District of New York (Mukasey, J.) has been reported at 733 F.Supp.2d 613, and both the original opinion and order and the amended opinion and order are reprinted in the appendix hereto, p. A-10, infra.

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was entered on April 25, 1990. This

petition for writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. Section 6404(e), 6532(a) and 7422(a) and (c) are set out in their entirety in the Appendix hereto.

STATEMENT OF THE CASE

The petitioners[1] were investors

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[1]Petitioners Joseph and Rose Magnone filed joint tax returns for all periods in question (i.e. 1974 through 1979) and are the parents of petitioner Michael Magnone. Michael Magnone filed a return separate from his parents for all periods covered by his complaint (i.e. 1975 through 1979). Separate complaints were filed for petitioners Joseph and Rose Magnone and Michael Magnone but the complaints were consolidated both in the District Court and in the Second Circuit. The issues of law raised in the both complaints are identical and the issues of fact

in certain real estate limited partnerships during 1974, 1975 and 1976 and prepared and filed their federal income tax returns for those periods on a timely basis. During 1978 the Internal Revenue Service ("IRS") notified petitioners that their tax returns had been selected for audit examination. From time to time thereafter the IRS required petitioners to waive the statute of limitations on the assessment and collection of any deficiency for the tax years 1974 through 1976.

After a delay in excess of twelve years from the time the petitioners

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are substantially the same, differing only in regard to the number of years audited, the amount of tax and interest assessed and the dates that certain notices were provided by the IRS and received by the petitioners.

filed their original tax returns, the IRS on June 16, 1987 executed Form 870-AD, Offer of Waiver of Restrictions on Assessments and Collection of Deficiency in Tax, in regard to all of the petitioners.

The petitioners remitted to the IRS the full amount of the assessed and unpaid taxes arising out of the subject years, but have been unable to pay the accumulated interest that was assessed, which interest assessment was approximately twice the amount of the assessed tax.[2]

In October 1987, petitioners filed Form 843, Claim for Refund, ("Refund Claim") in response to the passage of Public Law 99-514 (which established

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[2]At the time of the execution of

Internal Revenue Code Section 6404(e)) and the issuance of IRS Revenue Procedure 87-42.

The Refund Claim, by a misdesignation, sought an abatement of interest pursuant to 26 U.S.C. 6601. Subsequently, and in a timely fashion, the petitioners', by letter of their counsel, amended the Refund claim to include a request for an abatement of interest pursuant to 26 U.S.C. 6404(e) and Revenue Procedure 87-42.

The IRS never issued a formal notice of acceptance or rejection of the filed claim for refund. Consequently, petitioners filed their

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Form 870-AD Michael Magnone's assessed tax was $80,604 but his assessed interest was $149,827. Similarly, Joseph and Rose Magnone's tax liability at the time of assessment was $267,584 and their interest liability was $510,570.

complaints in the United States District Court pursuant to 26 U.S.C. 7422(a) and 6532(a). Prior to filing their complaints the petitioners remitted to the IRS the taxes due for the audited years and the interest due for the 1979 tax year.

On or about May 31, 1989, Respondent filed a motion in the District Court seeking to dismiss the petitioners' complaints on the grounds that:

1. Petitioners lacked jurisdiction to bring the action because they had not made full payment of the assessments at issue;

2. Petitioners lacked jurisdiction to bring an action because they had not properly presented their refund claims to the IRS; and

3. Petitioners could not rely on 26 U.S.C. 6404(e) to seek an abatement of interest assessed after December 31, 1978 on transactions that occured in years prior to 1978.

Petitioners, in their Memorandum in opposition to the motion to dismiss, argued that:

1. Full payment of taxes and interest had been made for 1979, the only year at issue in their complaints;

2. The IRS was on actual notice of the basis for petitioners' claim for abatement;

3. Section 6404(e) was applicable to any deficiency arising after December 31, 1978, including those arising out of the automatic, annual assessment of interest; and

4. That the assessment which gave rise to the interest sought to be abated was entered on June 16, 1987, a date far past the Act's effective date of December 31, 1978.

Judge Mukasey, of the District Court for the Southern District of New York, ruled in favor of the Respondent granting its motion to dismiss.—

Petitioners filed an appeal with the Second Circuit seeking the review of Judge Mukasey's order. On April 25, 1990, the Second Circuit in a per curiam opinion affirmed Judge Mukasey's order.

REASONS FOR GRANTING THE WRIT

The petitioners' respectfully submit that a writ of certiorari should be granted because the case is imbued

with issues of wide-ranging public concern. Without the intervention of the United States Supreme Court in reversing prior lower court determinations, certain actions of the IRS have been declared immune from judicial review. As a consequence taxpayers are being deprived of their constitutional rights of due process and of remedial legislation enacted by Congress.

I.

THE UNREASONABLE DELAY IN AN AUDIT OF PETITIONERS' TAX RETURNS FOR A PERIOD IN EXCESS OF TWELVE YEARS VIOLATED THE PETITIONERS' CONSTITUTIONAL RIGHT TO DUE PROCESS

In the within action the petitioners were informed by the IRS in 1978 that their tax returns were selected for examination in conjunction

with the audit of certain real estate limited partnerships in which the petitioners had invested. While the notice of intent to audit was served on the petitioners in 1978, the audit was finally concluded with the execution of form 870-AD in June 1987, some twelve years after the original filing of the petitioners' tax returns in April 1975. The petitioners alleged in their complaint that no aspect of the "delay was attributable to the plaintiff." This was not denied by the IRS.

It offends any basic doctrine of fairness to allow the IRS to delay an audit of an individual's income tax return for a period of twelve years and to then allow the IRS to collect interest at above market rates to

compensate it for the delay it caused. This situation is exactly the reason that Congress passed Section 6404(e).

Further, the length of the delay, the lack of any valid reason for the delay and the damage caused to the petitioners has resulted in the denial of due process to the petitioners. Barker v. Wingo, 407 U.S. 514, 92 S. Ct., 2182, 33 L.Ed. 2d 101 (1972); United States v. Von Neuman, 474 U.S. 242, 106 S.Ct. 610 88 L.Ed. 2d 587 (1986). It is imperative that this court return to taxpayers the protection that Congress intended them to have against the procrastination and administrative errors of the IRS.

In the within matter the IRS has not been damaged by its negligent

delay. However, the taxpayers may be financially destroyed by the unjustified delay, which the petitioners played no part in causing.

II.

ACTIONS BY THE IRS PURSUANT TO THE PROVISIONS OF 26 U.S.C. 6404 SHOULD NOT BE IMMUNE FROM JUDICIAL REVIEW

A series of cases in two circuits and the United States Tax Court and Court of Claims have held that federal courts are precluded from reviewing the actions taken by the IRS in carrying out the mandate of 26 U.S.C. 6404(e). Those cases, and their holdings, are summarized below:

(a) The United States District Court for the Middle District of Georgia, in Horton Homes, Inc. v. The United States, 727 F. Supp. 1450 (M.D.

Georgia, 1990), held that it did not have jurisdiction to review a taxpayer's claim that the IRS had acted improperly in denying a request for the abatement of interest pursuant to 26 U.S.C. 6404. The District Court reasoned that since Congress made the decision to abate interest in Section 6404 discretionary, not mandatory, then taxpayers could not seek judicial review of the discretionary decisions made by the IRS.

(b) The United States District Court for the Western District of Oklahoma followed Horton in Selman v. United States of America, 733 F.Supp. 1444 (W.D. Okla., 1990). The Court, in following Horton found that Section 6404 "...(is) a statute to which there

is no law to apply, and thus it is not judicially reviewable." The Court further found that Congress granted discretion to the Secretary to abate interest but did not establish any guidelines by which the Court might review the Secretary's determination.

(c) In Brahms v. The United States of America, 18 Cl.Ct. 471 (1989), the Court of Claims used similar reasoning in determining that it did not have jurisdiction to review decisions made by the IRS in regard to Section 6404. The Court also decided that Section 6404 was judicially non-reviewable because it contained no standards for assessing the propriety of the IRS's decisions, and thus, was subject to the "no law" rule set forth in Heckler v.

Chaney, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1984).

(d) The United States Tax Court in 805 Clinton St. Corp. v. Commissioner, 89 T.C. 352 (1987), held that since the Tax Court lacks jurisdiction to hear cases involving equitable relief, it may not consider claims involving section 6404(e). The Court observed that while it appears that Congress "inadvertently" failed to confer jurisdiction on the Tax Court to hear such claims, it nonetheless, left the matter to Congress to correct.

While the rationale of the courts differ, each concludes that the IRS is immune from judicial review of its actions in regard to the exercise of discretion under 26 U.S.C. 6404(e).

The Courts further held that there is no standard by which to review whether there is an abuse of discretion by the Service.

The net effect of these courts' decisions is:

(a) the repeal of the statutory remedy that Congress intended to provide to taxpayers in Section 6404(e);

(b) the determination that neither a court nor a finder of fact is capable of deciding whether an action taken by the Service in failing to abate interest is "grossly unfair" or not H.R. Report No. 99-313, 99th Cong., 2nd Sess. 844 (1986-3 Cum. Bull. (Vol. 2) 844); Senate Report No. 99-313, 99th Cong., 2nd Sess. 208 (1986-3 Cum. Bull (Vol. 3) 208); and,

(c) the unleashing of the Internal Revenue Service from reasonable restraints and a duty to deal with taxpayers in a fair and timely manner.

III.

INTEREST, TAX OR PENALTIES ASSESSED AFTER DECEMBER 31, 1978 ARE DEFICIENCIES SUBJECT TO REVIEW IN ACCORDANCE WITH SECTION 6404(e)

For the petitioners to be

successful in their appeal, they must be able to demonstrate that they are entitled to seek relief under 26 U.S.C. 6404(e). That Section applies "...to interest accruing with respect to deficiencies or payments for taxable years beginning after December 31, 1978." Pub.L. 99-514, Sec. 1563(b), 100 Stat. 2762 (1986).

The District Court, in dismissing the petitioners' complaints below, held that section 6404(e) applies "...only to interest accruing on deficiencies for tax years after 1978. Here the challenged interest accrued with respect to deficiencies and payments for the years 1974, 1975 and 1976, which are clearly earlier than December 31, 1978." (p.A-42, infra.) In

reaching that conclusion, however, the District Court never examined the issues of: "What payments are covered by the provisions of section 6404(e)?"; "What constitutes a deficiency?"; and, "When does a deficiency arise?" These questions go to the core of petitioners' appeal herein.

(a) What "payments" are covered by the provisions of Section 6404(e)?

26 U.S.C. 6404(e) applies to all "payments" for taxable years beginning after December 31, 1978. Thus, if a taxpayer makes a payment after December 31, 1978, on a liability that it had to the IRS on account of interest which accrued during the year ended December 31, 1979, then such amount should be subject to the provisions of Section 6404(e).

These are the exact facts in the case before this Court; petitioners, during 1988, paid the interest that they owed to the IRS which accrued during the calendar year 1979. In the action in the district court petitioners sought to recover this payment of 1979 interest, based upon the provisions of Section 6404(e).

(b) What constitutes a "deficiency"?

There is no clear definition of "deficiency" in the Internal Revenue Code. Section 6211(a) of the Internal Revenue Code defines a deficiency as

> the amount by which the tax imposed by Subtitle A or B...exceeds the excess of-
>
> (1) the sum of-
>
> (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer

and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amount previously assessed (or collected without assessment) as a deficiency, over

(2) the amount of rebates, as defined in subsection (b)(2), made.

Internal Revenue Service Revenue Ruling 78-20, 1978-1 CB 441, in pertinent part states:

> "Section 6659(a) of the Code provides that the additions to tax, additional amounts, and penalties provided by Chapter 68 shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes and that <u>any reference in the Code to the term "tax" shall be deemed to also refer to such additions to the tax, additional amounts, and penalties</u>." (emphasis added)

Thus, if Section 6211 and the Revenue Ruling are read together, additions to tax (i.e. the accumulation of interest) are to be treated as, and collected as, "taxes" and unpaid taxes

constitute a deficiency. The only remaining issue is --- When does a tax deficiency, constituted of accrued interest, become a deficiency.

(c) When does a deficiency arise? A deficiency may arise either by the act of an assessment (i.e. when the Service issues a notice of deficiency which is either accepted by the taxpayer, or upheld by a court of competent jurisdiction) or automatically, by operation of law.

(i) Deficiency arising from an act of assessment. Petitioners have taken the position that all interest which accumulated on their indebtedness to the Service (which arose out of their execution of Form 870-AD in June 1987) is interest "...accruing with

respect to deficiencies or payments for taxable years beginning after December 31, 1978." Petitioners take this position based upon the reasoning that since the deficiency arose solely as a result of their execution of the Waiver of Restrictions on Assessment then the deficiency was created, as a matter of law on June 16, 1987. If petitioners are correct in this belief, they are entitled to seek relief under section 6404(e), and the decision of the District Court is in error.

(ii) Deficiency arising by operation of law. Deficiencies may also arise by operation of law, e.g. the automatic assessment of interest and penalties or the automatic assessment of additional tax arising

out of the correction of a mistake on a filed return. Petitioners argue that these automatic assessments become "deficiencies" immediately upon their computation by the Service, and represent a deficiency for the period for which they are calculated.

Therefore, as in the within case, when a taxpayer has a liability to the Service during any calendar year, regardless of the year in which the underlying transaction occurred, the accruing interest becomes a liability (i.e. a deficiency) in the year in which it accrues.

Petitioners believe that this automatic assessment of interest is analogous to the accrual of interest on a loan; i.e. interest accrues on a loan

due to the passage of time and the interest which accrues becomes a new liability from the debtor to the creditor which exists separate and apart from the underlying principal amount owed. Similarly, the automatic accrual of interest, creates a new and distinct liability of the taxpayer to the Service for each period in which interest accrues. Further, that interest becomes a deficiency automatically upon its calculation, in the year that it is calculated. Using this line of reasoning, the interest payments made by the petitioners in 1988 are subject to refund under Section 6404(e).

IV.

PAYMENT OF INTEREST IN FULL FOR 1979 SATISFIED THE "FULL PAYMENT DOCTRINE" GIVING THE DISTRICT COURT JURISDICTION TO HEAR PETITIONERS' REFUND SUIT

The district court, in its amended

opinion and order (p.A-10 infra) cited Flora v. United States, 362 U.S. at 177, for the premise that there must be full payment of all of the tax liabilities, due for the disputed tax year, before the taxpayer may initiate an action in federal district court. The district court also indicated that the Flora court was willing to establish this rather harsh rule because taxpayers could avoid the "hardship" simply by bringing their claims in the Tax Court (p.A-61, infra.). In its original opinion the district court went on to hold that petitioners could "...contest the interest without paying it if they wished to do so in tax court." (p.A-61 infra.). Unfortunately, this statement by the district court was

incorrect, as reflected by the issuance of the court's amended opinion in which the only change was the deletion of the quoted reference above.

Petitioners respectfully submit that the decision of the district court was affected by its belief that petitioners had recourse to the Tax Court...unfortunately, petitioner does not.

Petitioners respectfully submit that Flora was a "proper venue" case. The court wished to establish clear and concise guidelines as to where a taxpayer could bring an action regarding claims against the IRS. In the within action, petitioners had no choice of venue; they could bring their action only in district court.

Petitioners further submit that district court jurisdiction can be found in the language of section 6404(e) itself. Congress clearly indicated that taxpayers should be able to seek forgiveness of interest before it was paid (i.e. abatement). As the Tax Court clearly described in 805 Clinton Street, supra, jurisdiction may not lie in the Tax Court and therefore must lie in the district court.

Lastly, petitioners did pay the entirety of their 1979 liability to the IRS (including interest on the 1974 through 1976 claims) prior to beginning the within action. As petitioners argued in their memoranda and briefs below, the payment for the entire 1979 liability created jurisdiction in the

district court to hear their complaint.

V.

THE IRS RECEIVED ADEQUATE NOTICE OF PETITIONERS' CLAIMS

Petitioners' notice of claim to the IRS should be recognized whether given informally or formally. The courts below erred on the facts and the law with respect to this issue and petitioners' rights are severly prejudiced.

Pursuant to statutory and case law the prior claim rule requires taxpayers to claim a refund from the IRS prior to suit, 26 U.S.C. 7422(c); and that the grounds set forth in a refund suit be the same as that set forth in the refund claim. Union Pacific Railroad Company v. United States, 359 F.2d 437 (1968). cert. denied, 395 U.S. 944, 895

Cl.Ct. 2017, 23 L.Ed. 2d 462 (1969). Moreover, the purposes of the prior claim rule are to "prevent surprise and give adequate notice to the IRS of both the nature of the claim and the specific facts upon which it is predicated". Pearson v. Commissioner of Internal Revenue Service, 443 F.Supp. 878 (1978); Union Pacific Railroad Co. v. United States, 389 F.2d 437, 442, 182 S.Ct. 103 (1968), cert. denied, 395 U.S. 944, 89 S.Ct. 2017, 23 L.Ed.2d 462 (1969).

However, the prior claim doctrine has been modified by the informal claims rule which permits the taxpayers to make claims in ways other than those formally required by procedure. 10 Mertens Law of Federal Income Taxation

Section 58A.06; American Security & Trust Co. v. Tait, 5 F.Supp. 337 (DC Md, 1933); T.J. West Co., Ltd. v. Rogan, 54 F.Supp. 460 (DC SD Cal, 1984); Stoller v. United States, 444 F.2d 1319 (CA 5th, 1971). The informal claim must be made timely, include a written component and adequately apprise the IRS that a refund is sought for certain years. American Radiator & Standard Sanitary Corporation v. United States, 318 F.2d 915, 162 Ct.Cl. 106 (1963).

In the case herein, a review of the exhibits annexed to petitioner's Memorandum in Opposition to a Respondent's Motion to Dismiss, reveal that not only had petitioners, by their counsel, informed the IRS of their

6404(e) and 87-42 claim in writing but the IRS responded demonstrating its knowledge that the basis of the claims were under 6404(e).

Said communications satisfy the purposes of the prior claim rule by both informing the IRS of the nature of the claim and preventing surprise. Therefore, petitioners had satisfied both the letter and the spirit of the law.

CONCLUSIONS

The petitioners respectfully submit that the writ of certiorari should be granted for the following reasons:

1. The IRS has a responsibility to deal fairly with taxpayers. Its delay of twelve years in examining the income tax returns filed by petitioners

constitutes a gross violation of petitioners' right to due process and fair treatment.

2. If this court does not overturn the decisions of the district courts, the Court of Claims, and the Tax Court taxpayers will have no venue in which to seek review of the IRS's actions in regard to section 6404(e) and, thus, the intent of Congress in providing the remedial statute will have been frustrated.

3. The IRS had actual notice of the basis of the claims made by the petitioners; the district court erred in ruling that the notice provided by petitioners was inadequate.

4. Payments made after December 31, 1978 in payment of accrued interest

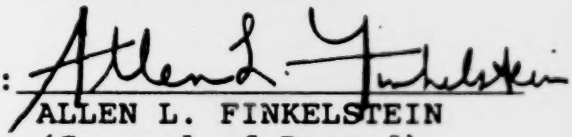
for tax years occurring after 1978 are subject to review in accordance with the provisions of section 6404(e).

5. The district court improperly applied the "full payment doctrine" in dismissing the complaint of the petitioners.

July 24, 1990

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

MANDATE

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the day of one thousand nine hundred and ninety.

Present: HON. WILLIAM H. TIMBERS,

HON. GEORGE C. PRATT,

HON. ROGER J. MINER,

Circuit Judges,

MICHAEL MAGNONE,

Plaintiff-Appellant,

Corrected Docket No. 90-6006, 90-6008

v

UNITED STATES OF AMERICA,

Defendant-Appellee

Appeal from the United States

District Court for the Southern
District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby qrdered, adjudged and decreed that the judgement of said District court be and it hereby is affirmed in accordance with the opinion of this court with costs to be gaxed against the Appellant.

Elaine B. Goldsmith,
Clerk

Edward J. Guardaro
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1151, 1145—August Term 1989

Argued: April 18, 1990 Decided: April 25, 1990

Docket Nos. 90-6006, 90-6008

MICHAEL MAGNONE,

Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

JOSEPH V. MAGNONE and ROSE MAGNONE,

Plaintiffs-Appellants,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

TIMBERS, PRATT, and MINER,
Circuit Judges.

Appeals from judgment of United States District Court for the Southern District of New York, Michael B. Mukasey, *Judge*, dismissing plaintiffs' suits for abatement of interest.

Affirmed.

JED RUBENFELD, New York, NY, Assistant United States Attorney for the Southern District of New York (Otto G. Obermaier, United States Attorney for the Southern District of New York, Marla Alhadeff, Assistant United States Attorney, of Counsel), *for Appellee.*

H.J. GARTLAN, Jr., New York, NY, (Finkelstein Bruckman Wohl Most & Rothman, of Counsel), *for Appellant.*

PER CURIAM:

Michael Magnone and Joseph V. and Rose Magnone appeal from a judgment of the United States District

Court for the Southern District of New York, Michael B. Mukasey, *Judge*, dismissing their suits for abatement of interest on tax deficiency assessments. We affirm for the reasons given by Judge Mukasey in his thorough opinion reported at ____ F. Supp. ____. We write only to clarify the circuit law.

In 1987 the Internal Revenue Service (IRS) assessed plaintiffs for tax deficiencies in the tax years 1974-1976. In 1988 plaintiffs paid all taxes due for those years as well as the interest accrued in 1979. They did not pay the interest accrued for the other years. Relying on 26 U.S.C. § 6601(c), they filed for an abatement of the interest charges claiming IRS delay. When the IRS failed to respond, plaintiffs commenced these suits seeking refund of the interest. Judge Mukasey held that jurisdiction was lacking because plaintiffs did not satisfy either the full-payment rule or the prior-claim rule; and that no claim had been stated because under the applicable statute the suits were not authorized for the particular tax years at issue.

First, the full payment rule requires as a prerequisite for federal court jurisdiction over a tax refund suit, that the taxpayer make full payment of the assessment, including penalties and interest. *Flora v. United States*, 357 U.S. 63 (1958), *aff'd on rehearing*, 362 U.S. 145 (1960). Since plaintiffs had paid accrued interest only for the year 1979, they did not make the required full payment of the interest accrued from the delinquencies up to the time of payment.

Nevertheless, plaintiffs contend they complied with the single-year rule which provides that the jurisdictional prerequisite is satisfied when a taxpayer makes "full payment of a tax liability for any given year." *Green v.*

United States, 220 Ct. Cl. 712, 713 (1979). We agree with Judge Mukasey's interpretation of the rule that a payment of interest "constitute[s] full payment only if it includes all interest relating to the year for which the deficiency has been assessed, but not if it is simply one year's worth of interest on a past deficiency", as it was here. Thus, under either rule plaintiffs have not met the jurisdictional requirement.

Second, under the prior-claim rule, a taxpayer must bring the claim for refund to the IRS as a prerequisite to jurisdiction for the suit in federal court. 26 U.S.C. § 7422(a). Consequently, in pursuing such a suit, a taxpayer may not raise different grounds than those brought to the IRS. *Union Pacific RR Co. v. United States*, 389 F.2d 437, 442 (Ct. Cl. 1968).

In their IRS claim, plaintiffs relied on 26 U.S.C. § 6601(c) and sought suspension of all interest accrued on each of the three deficiency assessments. Their federal court complaint relied on 26 U.S.C. § 6404(e) and sought abatement only of that interest which had accrued on those deficiencies in the year 1979. As Judge Mukasey described in detail, these claims are entirely different and therefore cannot satisfy the jurisdictional requirement of the prior-claim rule.

Finally, section 6404(e), on which plaintiffs now rely, applies only to "interest accruing with respect to deficiencies or payments for taxable years beginning after December 31, 1978." Pub. L. No. 99-514, § 1563(b)(1), 100 Stat. 2085, 2762 (1986). We agree with Judge Mukasey's interpretation that § 6404(e) applies "only to interest accruing on deficiencies for tax years after 1978." He correctly held that "[h]ere, the challenged interest accrued with respect to deficiencies and payments for

the years 1974, 1975 and 1976, which are clearly earlier than December 31, 1978. Consequently, plaintiffs cannot sue for those years".

Accordingly, the district court's judgment is affirmed in all respects.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MICHAEL MAGNONE,
Plaintiff, 89 Civ. 1837 (MBM)

against

UNITED STATES OF AMERICA,

Defendant. JUDGMENT

----------x

JOSEPH V. MAGNONE and ROSE MAGNONE, 89 Civ. 1838 (MBM)

Plaintiffs,

against

UNITED STATES OF AMERICA,

Defendant.
----------x

The government having moved to dismiss the complaints under F.R.Civ.P. 12(b)(1) and 12(b)(6), and the said motion having come before the Honorable MICHAEL B. MUKASEY, U.S.D.J., and the Court thereafter on October 13, 1989, having handed down its opinion and

order (#65016); granting defendant's motion under F.R.Civ.P. 12(b)(1) and 12(b)(6) and dismissing the complaints, it is,

ORDER, ADJUDGED AND DECREED: That defendant's motion to dismiss the complaints under F.R.Civ.P. 12(b)(1) and 12(b)(6) be and it is hereby granted, and it is further,

ORDERED, that the complaints be and they are hereby dismissed.

/s/Raymond F. Burgman
Clerk

DATED: NEW YORK, NEW YORK
July 17, 1990

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 10/18/89.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MICHAEL MAGNONE,

Plaintiff, 89 Civ. 1837 (MBM)

-against-

UNITED STATES OF AMERICA,

Defendant.

----------x

JOSEPH V. MAGNONE and
ROSE MAGNONE,

Plaintiff, 89 Civ. 1838 (MBM)

-against-

UNITED STATES OF AMERICA, AMENDED OPINION AND ORDER

Defendant.

----------x

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MICHAEL B. MUKASEY, U.S.D.J.

Plaintiffs Michael Magnone and Joseph and Rose Magnone sue under 26 U.S.C. 7422 to recover sums paid to the Internal Revenue Service, which plaintiffs characterize as the amount of interest that accrued during 1979 on their 1974, 1975 and 1976 tax deficiencies. Although plaintiffs do not cite in their complaints the code section under which they seek relief, they state in their memorandum that they are suing under 26 U.S.C. 6404(e) for abatement of interest attributable to errors and delays by the IRS.

Congress has provided taxpayers with an opportunity, under section 6404, to sue for an abatement of interest that has been assessed on certain deficiencies.

This interest must be attributable solely to errors or delays by IRS employees while performing "ministerial acts." 26 U.S.C. 6404(e)(1). Congress has permitted such suits, however, only for "interest accruing with respect to deficiencies or payments for taxable years beginning after December 31, 1978." Pub. L. 99-514, Sec. 1563(b)(1), 100 Stat. 2085, 2762 (1986).

Furthermore, a taxpayer wishing to sue in district court for a refund must have paid the full assessment in question before bringing suit. Flora v. United States, 357 U.S. 63 (1958), aff'd on reh'g, 362 U.S. 145 (1960). The taxpayer also must have filed the same claim with the IRS, 26 U.S.C. 7422(a), and may file a refund suit in district court only if the IRS has

rejected the administrative claim or disregarded it for over six months. 26 U.S.C. 6532(a)(1).

The taxpayers in this case argue that they should be allowed to sue in district court because they paid all the interest that accrued in 1979 for deficiencies in tax years 1974 through 1976. They assert that their payment of a sum equivalent to one year of interest allows them to sue for a refund under the Flora prepayment rule and 26 U.S.C. 7422. They assert also that this payment satisfies the section 6404 provision limiting refund suits for interest to deficiencies for taxable years beginning after December 31, 1978. Pub. L. 99-514, section 1563(b), 100 Stat. 2085, 2762 (1986).

The government moves to dismiss the

complaints under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), alleging that plaintiffs have failed to satisfy the jurisdictional requirements for bringing a tax refund claim in district court, and have failed also to state a claim under the tax code in that section 6404 does not permit this action.

Because plaintiffs have not satisfied the pre-payment rule, and because their claims in this court are completely different from their administrative claims, this court lacks jurisdiction over this case. Furthermore, because plaintiffs' claims also are barred by the time limitation Congress has place on section 6404, plaintiffs fail to state a claim upon which relief can be granted.

Accordingly, defendant's motion under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) must be granted and the complaints dismissed.

I.

In 1978, the IRS informed plaintiffs that it would audit plaintiffs' tax returns for the tax years 1974, 1975 and 1976. In November 1986, the IRS notified plaintiffs that their payments for the years in question were deficient.[1] Thereafter, plaintiffs paid the deficiencies assessed for those years,

[1]The amounts assessed against the two sets of plaintiffs were: $37,640 (1975) and $42,964 (1976) for Michael Magnone; $75,974 (1974), $70,678 (1975) and $120,932 (1976) for Joseph and Rose Magnone. These amounts do not include interest.

but not the interest which had accrued from 1974 through 1986. Instead, they filed a claim with the IRS in October, 1987 for abatement of the interest from 1974 to 1986, asserting without explanation that such interest was "suspended pursuant to section 6601(c)."[2]

In February, 1989, plaintiffs paid the IRS an amount they describe as "the interest allegedly due for tax year ended December 31, 1979." (Complaint,

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[2]It is unclear how section 6601(c) relates to this case. Section 6601(c) requires "suspension" of interest in cases where requirements such as the filing of a "waiver of restrictions under section 6213(d)" and the failure of the IRS to issue a notice of deficiency within 30 days have been met. The plaintiffs, in their claim before the IRS, did not explain how their case conforms to section 6601.

para. 14) In March, 1989, they filed an action in this court for a refund of the interest, alleging that the IRS's rejection of their claims was "illegal, improper, erroneous and an abuse of discretion," (Complaint, para. 15), and that the IRS's delay in the issuance of the deficiency notice was "grossly unfair." (Complaint, para. 17).

II.

Congress provided for district court jurisdiction over tax refund suits in 28 U.S.C. 1346(a)(1), and set forth in 26 U.S.C. 7422 the requirements for bringing such suits. These requirements have been further refined through regulations and case law. See 15 Mertens Law of Fed. Income Taxation section 584.06 (1989). The two main jurisdictional limitations at

issue in this case are the full payment rule, which hinges jurisdiction on plaintiffs' full payment of all amounts assessed against them, and the prior claim rule, which grants jurisdiction only when plaintiffs have filed a proper administrative claim with the IRS, and limits jurisdiction to those issues which were asserted in that administrative claim.

A) The Full Payment Rule

Under 28 U.S.C. 1346(a)(1), district courts have original jurisdiction over any "civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to

have been excessive or in any manner wrongfully collected under the internal-revenue laws." The Supreme Court in Flora interpreted this provision to require full payment of all deficiencies in suit as a condition for district court jurisdiction over a refund claim. Flora, 362 U.S. at 177. The Court recognized the hardship this requirement might impose on litigants, but asserted that litigants could avoid the prepayment rule by bringing their claims in Tax Court. Flora, 362 U.S. at 175.

Since Flora, federal courts consistently have interpreted the pre-payment rule as necessitating complete payment, and thus have prevented partial payments from conferring jurisdiction on district

courts.[3] See Cataldo v. United States, 73-1 U.S.T.C. paragraph 9325 (S.D.N.Y. 1971), aff'd, 456 F.2d 1335 (2d Cir. 1972); Amundson v. United States, 279 F. Supp. 779 (S.D.N.Y. 1967); Martinon v. Fitzgerald, 306 F. Supp. 922, 925 (S.D.N.Y. 1968), aff'd per curiam, 418 F.2d 1336 (2d Cir. 1969); Frise v. United States, 5 Cl. Ct. 488 (1984); Tracy v. United States, 225 F. Supp. 708 (S.D.Cal. 1963). As Judge Mansfield wrote in Martinon, "a federal district court does not have jurisdiction to entertain a taxpayer's

[3]The only exception to this prohibition against partial payments relates to divisible tax assessments, such as deficiencies in an employer's withholdings, which are not at issue in this case. See Boynton, 566 F.2d 50 (9th Cir. 1977); Steele v. United States, 280 F.2d 89 (8th Cir. 1960). See also 15 Mertens Law of Fed. Income Taxation section 58A.07 at 32.

suit for refund of part payment made pursuant to an assessment for an alleged deficiency in his income tax. The taxpayer must first pay the full amount of the assessment before he may challenge it under 28 U.S.C. 1346(a)." Martinon, 306 F.Supp. at 925.

Plaintiffs here contend that payment of an amount allegedly equivalent to the interest -- calculated solely for the year 1979 -- on their deficiencies from tax years 1974, 1975 and 1976 satisfies the full payment rule although this interest arises from deficiencies in previous tax years, and despite their failure to pay all the interest on such

deficiencies.[4] They argue that "as regards 1979, there are no outstanding taxes, penalties or interest for that particular calendar year...which have not been paid...It is for that 1979 year, and that year only, that plaintiffs seek relief by virtue of this action." (Pl. mem. at 5-6) Plaintiffs further allege that because interest is assessable on an "annual" basis, and is computed at an "annual" rate, interest assessable for a single

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[4]Apparently, plaintiffs' decision to pay the interest accrued on all deficiencies during 1979, as opposed to the interest on the 1974, 1975 or 1976 deficiency that has accrued during the years 1974 to 1986 stems from their interpretation of the provision limiting interest abatement claims under section 6404(e) to deficiencies "for taxable years beginning after December 31, 1978." Pub. L. 99-514(b), 100 Stat. 2085, 2762 (1986).

year may be the subject of a refund action even when the interest has been calculated based on deficiencies from previous years. (Pl. Mem. at 6) Plaintiffs argue that interest on the assessments for 1974, 1975 and 1976 that has been separated from these assessments and computed for one isolated year constitutes "full payment".

Indeed, a taxpayer who owes back taxes for several years may pay interest on and sue with respect to only only of them. See Green v. United States, 220 Ct. Cl. 712, 713 (1979), 79-2 U.S.T.C. paragraph 944[5].

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[5]Even in Green, which plaintiffs cite to support their interpretation, the Court of Claims dismissed the case for lack of subject matter jurisdiction because plaintiff did not pay the full tax liability assessed by the IRS for a

However, the interest payment for asingle tax year may constitute full payment only if it includes all interest relating to the year for which the deficiency has been assessed, but not if it is simply one year's worth of interest on a past deficiency. In other words, if plaintiffs wish to sue for a refund of interest for the year 1976, they could pay all interest that has accrued on the 1976 deficiency from 1976 until the time they paid the assessment, and then sue to recover this sum.

This is the only sensible interpretation of the full payment

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specific tax year. Green, 220 Ct. Cl. at 713.

rule, because the same issues that arise in this suit for a refund of interest that accrued during 1979 would arise in a claim encompassing interest that accrued during all other years since the deficiencies. All claims therefore should be brought at the same time, after full payment has been made, as "congress intended that all tax questions for any one taxable year should be included in one litigation." Tracy, 226 F. Supp. at 709. Nor should a taxpayer be allowed to litigate what looks like a small claim and then, if successful, gain collateral estoppel advantage as to a much larger claim.

This interpretation accords also with the policy underlying the Flora decision; in fact, plaintiffs' argument here in quite similar to petitioner's

argument in Flora, which the Supreme Court specifically rejected. In Flora, the IRS levied a deficiency assessment of $28,908.60, including interest, against petitioner. Petitioner paid $5,058.54, filed a claim for that amount with the IRS, and when that claim was rejected, sued for a refund in district court. Flora, 362 U.S. at 147. The Court, after examining 26 U.S.C. 1346 and a plethora of tax cases, concluded that the jurisdictional requirement of full -- and not partial -- payment of all sums is a fundamental assumption of our taxation system. This interpretation finds support in the existence of a two-part system for litigating claims: the Tax Court, where pre-payment is not required, and district court, where it

is. "The result is a system in which there is one tribunal for pre-payment litigation and another for post-payment litigation, with no room contemplated for a hybrid of the type proposed by petitioner." Flora, 362 U.S. at 163 (emphasis added).

If plaintiffs wish to contest the interest on that year's deficiency in this court, they must pay all the interest that has accrued on that year's deficiency. Because they have not done so, they have not satisfied the full payment rule, and the court lacks jurisdiction over this case.

B) The Prior Claim Rule

Even if the Flora doctrine did not preclude plaintiffs from litigating their claim here, plaintiffs' failure to meet statutory and regulatory

requirements for gaining access to this court mandates dismissal. Section 7422 of Title 26 sets forth the following prerequisite for bringing a refund suit in federal court:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected with authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. Subsection 7422(a) (emphasis added).

Plaintiffs here filed a claim with the IRS, and then waited six months without receiving an answer before filing in district court, as is required by 26 U.S.C. section

6532(a)(1). The government argues, however, that plaintiffs have not complied with section 7422 because: (1) plaintiffs paid the alleged interest only after filing the administrative claim with the IRS; and (2) plaintiffs base their claim here on completely different grounds from those asserted in their administrative claim. Plaintiffs argue that: (1) it was not necessary for them to have paid the alleged interest before filing their administrative claim, so long a they paid it before filing suit in district court; and (2) since the IRS understood the gist of their claim, the variance between the grounds for their administrative claim and for the current suit should not prevent them from going forward with this suit.

It is not necessary to reach defendant's first argument, which rests on a literal interpretation of section 7422.[6] Even if plaintiffs' claims the IRS may be considered "refund claim," plaintiffs still failed to meet the jurisdictional requirements for

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[6]The timing of plaintiffs' payments to the IRS allegedly is important because section 7422 allows for a refund suit in district court only if "a claim for refund or credit" already has been filed with the IRS. Here, one could argue that since plaintiffs had not yet paid the interest before filing their claim with the IRS, their claim was not a refund or credit claim regardless of what they called it on the IRS form, and they therefore did not satisfy the requirements of section 7422. Some courts have followed this literal interpretation of the statute. Newman v. United States, 64-1 U.S.T.C. paragraph 9359 (E.D.N.Y. 1964); Brielman v. United States, 74-2 U.S.T.C. paragraph 9668 (D.C. Mass. 1974).

bringing a refund suit in this court, because of the extreme variance between the administrative and district court claims.

Treasury Regulation section 301.6402-2(b)(1) provides, in part, that a taxpayer's administrative claim "must set forth in detail each ground upon which a creditor refund is claimed and facts sufficient to apprise the commissioner of the exact basis thereof." This regulation requires taxpayers to communicate sufficiently the basis of their claims, so that the IRS can conduct a sufficient investigation and avoid surprise later on. It thus precludes taxpayers from raising any additional grounds in district court that were not raised first in the administrative claim.

Mallette Bros. Construction Co. v. United States, 695 F.2d 145, 155 (5th Cir. 1983), cert. denied, 464 U.S. 935 (1983); Pearson v. C.I.R., 443 F. Supp 878, 880 (E.D.N.Y. 1978).

The Court of Claims explained the policy underlying this "variance doctrine" when it wrote that "a ground for refund neither specifically raised by, nor comprised within the general language of, a timely formal or informal application for refund to the Internal Revenue Service cannot be considered by a court in which a suit for refund is subsequently initiated . . . [this rule] is designed both to prevent surprise and to give adequate notice to the Service of the nature ofthe claim and the specific facts upon which it is predicated, thereby

permitting an administrative investigation and determination." Union Pacific Railroad Co. v. United States, 389 F.2d 437, 442 (Ct. Cl. 1968), reh'g on other grounds, 401 F.2d 778, cert. denied, 395 U.S. 944, reh'g denied, 194 Ct. Cl. 1021, cert. denied, 403 U.S. 931. See United States v. Felt & Tarrant Mfg. Co., 283 U.S. 269, 272 (1931); Real Estate-Land Title & Trust Co. v. United States, 309 U.S. 13, 18, (1940); Campagna v. U.S., 290 F.2d 682, 685 (2d Cir. 1961); Stoller v. U.S., 444 F.2d 1391, 1393 (5th Cir. 1971).

In the case at bar, plaintiffs' original claims filed with the IRS stated merely that :

> "interest on a deficiency of individual income tax for the tax

> periods ending December 31, 1974 through October 31, 1986 was suspended pursuant to Section 6601(c) of the Internal Revenue code. This is a claim for credit, refund or abatement of the interest collected or assessed for the period the suspension was in effect." (Complaint, Exh. A)

Plaintiffs now assert that by indicating the years involved and the type of "refund" requested (although they had not yet paid the alleged interest), they gave the IRS notice of their claim under the "informal claims" doctrine and therefore should not be precluded from bringing this suit. They further argue that their filing of the original refund claim under the wrong revenue procedure should not affect jurisdiction, since such a refund claim need not be technically perfect in order to serve as a basis for suit.

"Technical perfection" may not be necessary to inform the IRS sufficiently of a refund claim; in fact, courts occasionally have stated that not all variations between the IRS claim and the civil complaint are fatal to recovery. West v. Rogan, 54 F. Supp. 460, 461 (S.D. Cal. 1944). The same courts, however, also have emphasized the rule that "the claim made in an action of this character must be the same as the claim which was made before the Commissioner." West, 54 F. Supp. at 461. See also Stoller, 444 F.2d at 1393; 15 Mertens Law of Fed. Income Taxation section 58A.06 at 28.

The informal claims doctrine allows certain less formal written claims to constitute notice within the statute of

litigations if the claims sufficiently communicate the nature of the refund being sought. It thus prevents such claims from being barred by the statute of limitations when their formal counterparts are filed late. See Kales v. United States, 314 U.S. 186, 197 (1941); American Radiator and Standard Sanitary Corp. v. United States, 318 F.2d 915, 920 (Ct. Cl. 1963); Wall Industries, Inc. v. United States, 10 Cl. Ct. 82, 97-100 (1986). Even assuming, arguendo, that that doctrine applies to this case, the claim -- even if informal -- still must sufficiently apprise the IRS of enough facts and legal theories to prevent surprise in

the later civil suit.[7] "It is not enough that the Service have in its possession information from which it might deduce that the taxpayer is entitled to, or might desire, a refund." American Radiator, 318 F.2d at 920.

Plaintiffs relied before the IRS on completely different grounds from the ones they rely on in this action, and requested a different kind of relief.

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[7]According to Mertens Law of Federal Income Taxation, the IRS itself may waive formal requirements for actually filing a claim. Further, "an action for refund or credit will not fail where the taxpayer relies on a wrong statutory provision, so long as the complaint or petition states sufficient facts upon which relief may be granted. However, the taxpayer must state the same grounds in his claim for refund filed with the Commissioner and in his petition for refund filed in the courts." 15 Mertens Law of Fed. Income Taxation section 58A.06 at 28.

Their administrative claims cited section 6601(c) as the basis for recovery, while their complaints attempt to state a claim under 26 U.S.C. section 6404(e). Section 6601(c) provides for a suspension of interest on deficiencies when certain procedural requirements have been satisfied, while section 6404(e) provides for abatement of interest when the deficiency or payment is attributable to an IRS employee's error or delay. Furthermore, plaintiffs' IRS claims asked for a "credit, refund or abatement" of the entire interest assessed for tax years 1974 through 1986, while their civil suit requests a refund of the interest on deficiencies in those years that accrued only during 1979. The terseness of their

administrative claim does not provide sufficient information to prevent the IRS from undue surprise later on.[8] The extreme variance between the administrative claim and complaint in almost all respects, except for the word "interest," prevents plaintiffs from satisfying the prior claim rule.

Plaintiffs have neither fully paid all deficiencies, as mandated by Flora,

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[8]Plaintiffs claims that an IRS letter to Senator Alfonse D'Amato regarding the Magnone case illustrates that the IRS was "clearly on notice of the plaintiffs' claims." (Pl. Mem. at 9) This letter, however, merely suggests revenue procedures which plaintiffs could use to appeal their interest assessments, and nowhere indicates that the IRS knew the plaintiffs would be seeking a refund or basing their claim on 26 U.S. section 6404.

nor stated a proper claim with the IRS, as mandated by Treas. Reg. section 301.6402-2(b)(1). Their attempt to circumvent the time limitations on section 6404, the substantive basis for their suit, has taken plaintiffs outside the plain meaning of the jurisdictional statutes and regulations. This court therefore cannot assert jurisdiction over plaintiffs' suit and must dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1).

III.

Plaintiffs also fail to state a claim under 26 U.S.C. 6404(e). Congress specifically provided in the 1986 Act that section 6404(e) applies only to: "interest accruing with respect to deficiencies or payments for

taxable years beginning after December 31, 1978." Pub. L. 99-514, section 1563(b)(1), 100 Stat. 2085, 2762 (1986). The statute does not state that section 6404 applies to all interest accruing after December 31, 1978. If Congress had wanted this provision to apply to all interest accruing after a certain date, it knew how to write such a provision, as it did with respect to 26 U.S.C. 6601(c) in the very next section of the 1986 Act. The clause establishing the effective date for this amendment to section 6601(c) states: "The amendment made by section (a) shall apply to interest accruing after December 31, 1982." Pub. L. No. 99-514, section 1564(b), 100 Stat. 2085, 2763 (1986).

Congress wrote section 6404(e)

specifically to apply only to interest accruing on deficiencies for tax years after 1978. Here, the challenged interest accrued with respect to deficiencies and payments for the years 1974, 1975 and 1976, which are clearly earlier than December 31, 1978. Consequently, plaintiffs cannot sue for those years under section 6404(e).

* * *

For the above reasons, this court lacks subject matter jurisdiction over plaintiffs' claims, and plaintiffs fail to state claims for relief. The complaints in these cases must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

SO ORDERED:

Michael B. Mukasey,
U.S. District Judge

Dated: October 18, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MICHAEL MAGNONE,

Plaintiff, 89 Civ. 1837 (MBM)

-against-

UNITED STATES OF AMERICA,

Defendant.

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JOSEPH V. MAGNONE and
ROSE MAGNONE,

Plaintiff, 89 Civ. 1838 (MBM)

-against-

UNITED STATES OF AMERICA, OPINION AND ORDER

Defendant.

----------x

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MICHAEL B. MUKASEY, U.S.D.J.

Plaintiffs Michael Magnone and Joseph and Rose Magnone sue under 26 U.S.C. 7422 to recover sums paid to the Internal Revenue Service, which plaintiffs characterize as the amount of interest that accrued during 1979 on their 1974, 1975 and 1976 tax deficiencies. Although plaintiffs do not cite in their complaints the code section under which they seek relief, they state in their memorandum that they are suing under 26 U.S.C. 6404(e) for abatement of interest attributable to errors and delays by the IRS. Congress has provided taxpayers with an opportunity, under section 6404, to sue for an abatement of interest that has been assessed on certain deficiencies.

This interest must be attributable solely to errors or delays by IRS employees while performing "ministerial acts." 26 U.S.C. 6404(e)(1). Congress has permitted such suits, however, only for "interest accruing with respect to deficiencies or payments for taxable years beginning after December 31, 1978." Pub. L. 99-514, Sec. 1563(b)(1), 100 Stat. 2085, 2762 (1986).

Furthermore, a taxpayer wishing to sue in district court for a refund must have paid the full assessment in question before bringing suit. Flora v. United States, 357 U.S. 63 (1958), aff'd on reh'g, 362 U.S. 145 (1960). The taxpayer also must have filed the same claim with the IRS, 26 U.S.C. 7422(a), and may file a refund suit in district court only if the IRS has

rejected the administrative claim or disregarded it for over six months. 26 U.S.C. 6532(a)(1).

The taxpayers in this case argue that they should be allowed to sue in district court because they paid all the interest that accrued in 1979 for deficiencies in tax years 1974 through 1976. They assert that their payment of a sum equivalent to one year of interest allows them to sue for a refund under the Flora prepayment rule and 26 U.S.C. 7422. They assert also that this payment satisfies the section 6404 provision limiting refund suits for interest to deficiencies for taxable years beginning after December 31, 1978. Pub. L. 99-514, section 1563(b), 100 Stat. 2085, 2762 (1986).

The government moves to dismiss the

complaints under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), alleging that plaintiffs have failed to satisfy the jurisdictional requirements for bringing a tax refund claim in district court, and have failed also to state a claim under the tax code in that section 6404 does not permit this action.

Because plaintiffs have not satisfied the pre-payment rule, and because their claims in this court are completely different from their administrative claims, this court lacks jurisdiction over this case. Furthermore, because plaintiffs' claims also are barred by the time limitation Congress has place on section 6404, plaintiffs fail to state a claim upon which relief can be granted.

Accordingly, defendant's motion under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) must be granted and the complaints dismissed.

I.

In 1978, the IRS informed plaintiffs that it would audit plaintiffs' tax returns for the tax years 1974, 1975 and 1976. In November 1986, the IRS notified plaintiffs that their payments for the years in question were deficient.[1] Thereafter, plaintiffs paid the deficiencies assessed for those years,

[1]The amounts assessed against the two sets of plaintiffs were: $37,640 (1975) and $42,964 (1976) for Michael Magnone; $75,974 (1974), $70,678 (1975) and $120,932 (1976) for Joseph and Rose Magnone. These amounts do not include interest.

but not the interest which had accrued from 1974 through 1986. Instead, they filed a claim with the IRS in October, 1987 for abatement of the interest from 1974 to 1986, asserting without explanation that such interest was "suspended pursuant to section 6601(c)."[2]

In February, 1989, plaintiffs paid the IRS an amount they describe as "the interest allegedly due for tax year ended December 31, 1979." (Complaint,

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[2]It is unclear how section 6601(c) relates to this case. Section 6601(c) requires "suspension" of interest in cases where requirements such as the filing of a "waiver of restrictions under section 6213(d)" and the failure of the IRS to issue a notice of deficiency within 30 days have been met. The plaintiffs, in their claim before the IRS, did not explain how their case conforms to section 6601.

para. 14) In March, 1989, they filed an action in this court for a refund of the interest, alleging that the IRS's rejection of their claims was "illegal, improper, erroneous and an abuse of discretion," (Complaint, para. 15), and that the IRS's delay in the issuance of the deficiency notice was "grossly unfair." (Complaint, para. 17).

II.

Congress provided for district court jurisdiction over tax refund suits in 28 U.S.C. 1346(a)(1), and set forth in 26 U.S.C. 7422 the requirements for bringing such suits. These requirements have been further refined through regulations and case law. See 15 Mertens Law of Fed. Income Taxation section 584.06 (1989). The two main jurisdictional limitations at

issue in this case are the full payment rule, which hinges jurisdiction on plaintiffs' full payment of all amounts assessed against them, and the prior claim rule, which grants jurisdiction only when plaintiffs have filed a proper administrative claim with the IRS, and limits jurisdiction to those issues which were asserted in that administrative claim.

A) The Full Payment Rule

Under 28 U.S.C. 1346(a)(1), district courts have original jurisdiction over any "civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to

have been excessive or in any manner wrongfully collected under the internal-revenue laws." The Supreme Court in Flora interpreted this provision to require full payment of all deficiencies in suit as a condition for district court jurisdiction over a refund claim. Flora, 362 U.S. at 177. The Court recognized the hardship this requirement might impose on litigants, but asserted that litigants could avoid the prepayment rule by bringing their claims in Tax Court. Flora, 362 U.S. at 175.

Since Flora, federal courts consistently have interpreted the pre-payment rule as necessitating complete payment, and thus have prevented partial payments from conferring jurisdiction on district

courts.[3] See Cataldo v. United States, 73-1 U.S.T.C. paragraph 9325 (S.D.N.Y. 1971), aff'd, 456 F.2d 1335 (2d Cir. 1972); Amundson v. United States, 279 F. Supp. 779 (S.D.N.Y. 1967); Martinon v. Fitzgerald, 306 F. Supp. 922, 925 (S.D.N.Y. 1968), aff'd per curiam, 418 F.2d 1336 (2d Cir. 1969); Frise v. United States, 5 Cl. Ct. 488 (1984); Tracy v. United States, 225 F. Supp. 708 (S.D.Cal. 1963). As Judge Mansfield wrote in Martinon, "a federal district court does not have jurisdiction to entertain a taxpayer's

[3]The only exception to this prohibition against partial payments relates to divisible tax assessments, such as deficiencies in an employer's withholdings, which are not at issue in this case. See Boynton, 566 F.2d 50 (9th Cir. 1977); Steele v. United States, 280 F.2d 89 (8th Cir. 1960). See also 15 Mertens Law of Fed. Income Taxation section 58A.07 at 32.

suit for refund of part payment made pursuant to an assessment for an alleged deficiency in his income tax. The taxpayer must first pay the full amount of the assessment before he may challenge it under 28 U.S.C. 1346(a)." Martinon, 306 F.Supp. at 925.

Plaintiffs here contend that payment of an amount allegedly equivalent to the interest -- calculated solely for the year 1979 -- on their deficiencies from tax years 1974, 1975 and 1976 satisfies the full payment rule although this interest arises from deficiencies in previous tax years, and despite their failure to pay all the interest on such

deficiencies.[4] They argue that "as regards 1979, there are no outstanding taxes, penalties or interest for that particular calendar year...which have not been paid...It is for that 1979 year, and that year only, that plaintiffs seek relief by virtue of this action." (Pl. mem. at 5-6) Plaintiffs further allege that because interest is assessable on an "annual" basis, and is computed at an "annual" rate, interest assessable for a single

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[4]Apparently, plaintiffs' decision to pay the interest accrued on all deficiencies during 1979, as opposed to the interest on the 1974, 1975 or 1976 deficiency that has accrued during the years 1974 to 1986 stems from their interpretation of the provision limiting interest abatement claims under section 6404(e) to deficiencies "for taxable years beginning after December 31, 1978." Pub. L. 99-514(b), 100 Stat. 2085, 2762 (1986).

year may be the subject of a refund action even when the interest has been calculated based on deficiencies from previous years. (Pl. Mem. at 6) Plaintiffs argue that interest on the assessments for 1974, 1975 and 1976 that has been separated from these assessments and computed for one isolated year constitutes "full payment".

Indeed, a taxpayer who owes back taxes for several years may pay interest on and sue with respect to only only of them. See Green v. United States, 220 Ct. Cl. 712, 713 (1979), 79-2 U.S.T.C. paragraph 944[5].

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[5]Even in Green, which plaintiffs cite to support their interpretation, the Court of Claims dismissed the case for lack of subject matter jurisdiction because plaintiff did not pay the full tax liability assessed by the IRS for a

However, the interest payment for asingle tax year may constitute full payment only if it includes all interest relating to the year for which the deficiency has been assessed, but not if it is simply one year's worth of interest on a past deficiency. In other words, if plaintiffs wish to sue for a refund of interest for the year 1976, they could pay all interest that has accrued on the 1976 deficiency from 1976 until the time they paid the assessment, and then sue to recover this sum.

This is the only sensible interpretation of the full payment

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specific tax year. Green, 220 Ct. Cl. at 713.

rule, because the same issues that arise in this suit for a refund of interest that accrued during 1979 would arise in a claim encompassing interest that accrued during all other years since the deficiencies. All claims therefore should be brought at the same time, after full payment has been made, as "congress intended that all tax questions for any one taxable year should be included in one litigation." Tracy, 226 F. Supp. at 709. Nor should a taxpayer be allowed to litigate what looks like a small claim and then, if successful, gain collateral estoppel advantage as to a much larger claim.

This interpretation accords also with the policy underlying the Flora decision; in fact, plaintiffs' argument here in quite similar to petitioner's

argument in Flora, which the Supreme Court specifically rejected. In Flora, the IRS levied a deficiency assessment of $28,908.60, including interest, against petitioner. Petitioner paid $5,058.54, filed a claim for that amount with the IRS, and when that claim was rejected, sued for a refund in district court. Flora, 362 U.S. at 147. The Court, after examining 26 U.S.C. 1346 and a plethora of tax cases, concluded that the jurisdictional requirement of full -- and not partial -- payment of all sums is a fundamental assumption of our taxation system. This interpretation finds support in the existence of a two-part system for litigating claims: the Tax Court, where pre-payment is not required, and district court, where it

is. "The result is a system in which there is one tribunal for pre-payment litigation and another for post-payment litigation, with no room contemplated for a hybrid of the type proposed by petitioner." Flora, 362 U.S. at 163 (emphasis added).

It is open to plaintiffs to contest the interest without paying it if they wish to do so in Tax Court. If plaintiffs wish to contest the interest on one year's deficiency in this court, they must pay all the interest that has accrued on that year's deficiency. Because they have not done so, they have not satisfied the full payment rule, and the court lacks jurisdiction over this case.

B) The Prior Claim Rule

Even if the Flora doctrine did not

preclude plaintiffs from litigating their claim here, plaintiffs' failure to meet statutory and regulatory requirements for gaining access to this court mandates dismissal. Section 7422 of Title 26 sets forth the following prerequisite for bringing a refund suit in federal court:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected with authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. Subsection 7422(a) (emphasis added).

Plaintiffs here filed a claim with the IRS, and then waited six months

without receiving an answer before filing in district court, as is required by 26 U.S.C. section 6532(a)(1). The government argues, however, that plaintiffs have not complied with section 7422 because: (1) plaintiffs paid the alleged interest only after filing the administrative claim with the IRS; and (2) plaintiffs base their claim here on completely different grounds from those asserted in their administrative claim. Plaintiffs argue that: (1) it was not necessary for them to have paid the alleged interest before filing their administrative claim, so long a they paid it before filing suit in district court; and (2) since the IRS understood the gist of their claim, the variance between the grounds for their

administrative claim and for the current suit should not prevent them from going forward with this suit.

It is not necessary to reach defendant's first argument, which rests on a literal interpretation of section 7422.[6] Even if plaintiffs' claims the IRS may be considered "refund claim," plaintiffs still failed to meet the jurisdictional requirements for

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[6]The timing of plaintiffs' payments to the IRS allegedly is important because section 7422 allows for a refund suit in district court only if "a claim for refund or credit" already has been filed with the IRS. Here, one could argue that since plaintiffs had not yet paid the interest before filing their claim with the IRS, their claim was not a refund or credit claim regardless of what they called it on the IRS form, and they therefore did not satisfy the requirements of section 7422. Some courts have followed this literal interpretation of the statute. Newman v. United States, 64-1 U.S.T.C. paragraph 9359 (E.D.N.Y. 1964); Brielman v. United States, 74-2 U.S.T.C. paragraph 9668 (D.C. Mass.. 1974).

bringing a refund suit in this court, because of the extreme variance between the administrative and district court claims.

Treasury Regulation section 301.6402-2(b)(1) provides, in part, that a taxpayer's administrative claim "must set forth in detail each ground upon which a creditor refund is claimed and facts sufficient to apprise the commissioner of the exact basis thereof." This regulation requires taxpayers to communicate sufficiently the basis of their claims, so that the IRS can conduct a sufficient investigation and avoid surprise later on. It thus precludes taxpayers from raising any additional grounds in district court that were not raised first in the administrative claim.

Mallette Bros. Construction Co. v. United States, 695 F.2d 145, 155 (5th Cir. 1983), cert. denied, 464 U.S. 935 (1983); Pearson v. C.I.R., 443 F. Supp 878, 880 (E.D.N.Y. 1978).

The Court of Claims explained the policy underlying this "variance doctrine" when it wrote that "a ground for refund neither specifically raised by, nor comprised within the general language of, a timely formal or informal application for refund to the Internal Revenue Service cannot be considered by a court in which a suit for refund is subsequently initiated . . . [this rule] is designed both to prevent surprise and to give adequate notice to the Service of the nature ofthe claim and the specific facts upon which it is predicated, thereby

permitting an administrative investigation and determination." Union Pacific Railroad Co. v. United States, 389 F.2d 437, 442 (Ct. Cl. 1968), reh'g on other grounds, 401 F.2d 778, cert. denied, 395 U.S. 944, reh'g denied, 194 Ct. Cl. 1021, cert. denied, 403 U.S. 931. See United States v. Felt & Tarrant Mfg. Co., 283 U.S. 269, 272 (1931); Real Estate-Land Title & Trust Co. v. United States, 309 U.S. 13, 18, (1940); Campagna v. U.S., 290 F.2d 682, 685 (2d Cir. 1961); Stoller v. U.S., 444 F.2d 1391, 1393 (5th Cir. 1971).

In the case at bar, plaintiffs' original claims filed with the IRS stated merely that :

> "interest on a deficiency of individual income tax for the tax

> periods ending December 31, 1974 through October 31, 1986 was suspended pursuant to Section 6601(c) of the Internal Revenue code. This is a claim for credit, refund or abatement of the interest collected or assessed for the period the suspension was in effect." (Complaint, Exh. A)

Plaintiffs now assert that by indicating the years involved and the type of "refund" requested (although they had not yet paid the alleged interest), they gave the IRS notice of their claim under the "informal claims" doctrine and therefore should not be precluded from bringing this suit. They further argue that their filing of the original refund claim under the wrong revenue procedure should not affect jurisdiction, since such a refund claim need not be technically perfect in order to serve as a basis for suit.

"Technical perfection" may not be necessary to inform the IRS sufficiently of a refund claim; in fact, courts occasionally have stated that not all variations between the IRS claim and the civil complaint are fatal to recovery. West v. Rogan, 54 F. Supp. 460, 461 (S.D. Cal. 1944). The same courts, however, also have emphasized the rule that "the claim made in an action of this character must be the same as the claim which was made before the Commissioner." West, 54 F. Supp. at 461. See also Stoller, 444 F.2d at 1393; 15 Mertens Law of Fed. Income Taxation section 58A.06 at 28.

The informal claims doctrine allows certain less formal written claims to constitute notice within the statute of

litigations if the claims sufficiently communicate the nature of the refund being sought. It thus prevents such claims from being barred by the statute of limitations when their formal counterparts are filed late. See Kales v. United States, 314 U.S. 186, 197 (1941); American Radiator and Standard Sanitary Corp. v. United States, 318 F.2d 915, 920 (Ct. Cl. 1963); Wall Industries, Inc. v. United States, 10 Cl. Ct. 82, 97-100 (1986). Even assuming, arguendo, that that doctrine applies to this case, the claim -- even if informal -- still must sufficiently apprise the IRS of enough facts and legal theories to prevent surprise in the later civil suit.[7] "It is not enough that the Service have in its possession information from which it

might deduce that the taxpayer is entitled to, or might desire, a refund." American Radiator, 318 F.2d at 920.

Plaintiffs relied before the IRS on completely different grounds from the ones they rely on in this action, and requested a different kind of relief.

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[7]According to Mertens Law of Federal Income Taxation, the IRS itself may waive formal requirements for actually filing a claim. Further, "an action for refund or credit will not fail where the taxpayer relies on a wrong statutory provision, so long as the complaint or petition states sufficient facts upon which relief may be granted. However, the taxpayer must state the same grounds in his claim for refund filed with the Commissioner and in his petition for refund filed in the courts." 15 Mertens Law of Fed. Income Taxation section 58A.06 at 28.

Their administrative claims cited section 6601(c) as the basis for recovery, while their complaints attempt to state a claim under 26 U.S.C. section 6404(e). Section 6601(c) provides for a suspension of interest on deficiencies when certain procedural requirements have been satisfied, while section 6404(e) provides for abatement of interest when the deficiency or payment is attributable to an IRS employee's error or delay. Furthermore, plaintiffs' IRS claims asked for a "credit, refund or abatement" of the entire interest assessed for tax years 1974 through 1986, while their civil suit requests a refund of the interest on deficiencies in those years that accrued only during 1979. The terseness of their

administrative claim does not provide sufficient information to prevent the IRS from undue surprise later on.[8] The extreme variance between the administrative claim and complaint in almost all respects, except for the word "interest," prevents plaintiffs from satisfying the prior claim rule.

Plaintiffs have neither fully paid all deficiencies, as mandated by Flora,

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[8]Plaintiffs claims that an IRS letter to Senator Alfonse D'Amato regarding the Magnone case illustrates that the IRS was "clearly on notice of the plaintiffs' claims." (Pl. Mem. at 9) This letter, however, merely suggests revenue procedures which plaintiffs could use to appeal their interest assessments, and nowhere indicates that the IRS knew the plaintiffs would be seeking a refund or basing their claim on 26 U.S. section 6404.

nor stated a proper claim with the IRS, as mandated by Treas. Reg. section 301.6402-2(b)(1). Their attempt to circumvent the time limitations on section 6404, the substantive basis for their suit, has taken plaintiffs outside the plain meaning of the jurisdictional statutes and regulations. This court therefore cannot assert jurisdiction over plaintiffs' suit and must dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1).

III.

Plaintiffs also fail to state a claim under 26 U.S.C. 6404(e). Congress specifically provided in the 1986 Act that section 6404(e) applies only to: "interest accruing with respect to deficiencies or payments for

taxable years beginning after December 31, 1978." Pub. L. 99-514, section 1563(b)(1), 100 Stat. 2085, 2762 (1986). The statute does not state that section 6404 applies to all interest accruing after December 31, 1978. If Congress had wanted this provision to apply to all interest accruing after a certain date, it knew how to write such a provision, as it did with respect to 26 U.S.C. 6601(c) in the very next section of the 1986 Act. The clause establishing the effective date for this amendment to section 6601(c) states: "The amendment made by section (a) shall apply to interest accruing after December 31, 1982." Pub. L. No. 99-514, section 1564(b), 100 Stat. 2085, 2763 (1986).

Congress wrote section 6404(e)

specifically to apply only to interest accruing on deficiencies for tax years after 1978. Here, the challenged interest accrued with respect to deficiencies and payments for the years 1974, 1975 and 1976, which are clearly earlier than December 31, 1978. Consequently, plaintiffs cannot sue for those years under section 6404(e).

* * *

For the above reasons, this court lacks subject matter jurisdiction over plaintiffs' claims, and plaintiffs fail to state claims for relief. The complaints in these cases must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

SO ORDERED:

Michael B. Mukasey,
U.S. District Judge

Dated: October 12, 1989

STATUTORY PROVISIONS INVOLVED

26 U.S.C. 6404. Abatements.

(e) Assessments of interest attributable to errors and delays by Internal Revenue Service.

(1) In general. In the case of any assessment of interest on -

(A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, or

(B) any payment of any tax described in section 6212(a) to the extent that any error or delay in such payment is attributable to such an officer or employee being erroneous or dilatory in performing a ministerial act, the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the proceeding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has

contacted the taxpayer in writing with respect to such deficiency or payment.

26 U.S.C. Sec. 6532. Periods of limitation on suits.

(a) Suits by taxpayers for refund.

(1) General rule. No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the

Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(2) Extension of time. The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary.

(3) Waiver of notice of disallowance. If any person files a written waiver of the requirement that he be mailed a notice of disallowance, the 2-year period prescribed in paragraph (1) shall begin on the date such waiver is filed.

(4) Reconsideration after mailing of notice. Any consideration, reconsideration, or action by the Secretary with respect to such claim following the mailing of disallowance shall not operate to extend the period within which suit may be begun.

(5) Cross reference. For substitution of 120-day period for the 6-month period contained in paragraph (1) in a title 11 case, see section 505(a)(2) of title 11 of the United States Code.

26 U.S.C. Sec. 7422. Civil actions for refund.

(a) No suit prior to filing claim for refund.

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue

tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(c) **Suits against collection officer a bar.**

A suit against any officer or employee of the United States (or former officer or employee) or his personal representative for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected shall be treated as if the United States had been a party to such suit in applying the doctrine of res judicata in all suits in

respect of any internal revenue tax, and in all proceedings in the Tax Court and on review of decisions of the Tax Court.